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13  
14 UNITED STATES BANKRUPTCY COURT  
15 EASTERN DISTRICT OF CALIFORNIA

16 CURTIS A. WESTWOOD,  
17 Debtor.

18 Case No. 11-22755  
19 Chapter Number: 11  
20 DCN: DB-1

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22  
23 MOTION TO COMPEL THE TRUSTEE  
24 TO ABANDON PROPERTY OF THE  
25 ESTATE (APPEAL) PURSUANT TO 11  
26 U.S.C. 554(b) AND FEDERAL RULE OF  
27 BANKRUPTCY PROCEDURE 6007(b)  
28 AND MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF

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29 Date: January 11, 2011  
30 Time: 10:00 a.m.  
31 Ctrm: 34  
32 Location: 501 I St, Dept. D, 6th Flr  
33 Sacramento, CA 95814

34  
35 I. INTRODUCTION

36  
37 The statutory requirement for abandonment is straightforward and simple; a trustee  
38 should, and may be required to, abandon property which is burdensome to the estate or of  
39 inconsequential value and benefit. Here, the Chapter 11 Trustee asserts that the estate currently  
40 holds property – rights to an appeal -which is both burdensome to the estate and of

1 inconsequential value and benefit. As a result, and in light of the fulfillment of the statutory  
2 requirements, Curtis and Deborah Westwood<sup>1</sup> ("Westwoods") seeks an order from the Court  
3 abandoning the right to the appeal and to allow that state court litigation to continue to  
4 completion.

5                   **II. FACTUAL BACKGROUND**

6                 Prior to the instant bankruptcy filing, Comerica Bank ("Bank" or "Comerica") and  
7 Westwood Montserrat, Ltd. ("Borrower") entered into a loan transaction whereby Comerica  
8 loaned certain funds to Borrower for the purpose of developing real property located in Loomis,  
9 California. In connection with that loan, Comerica obtained purportedly enforceable guarantees  
10 from both Westwood Homes, Inc. and Debtor Curtis Westwood individually.

11                 After the Borrower encountered difficulties in repaying the loan, Comerica filed suit  
12 against the Debtor to recover on the guaranty in Sacramento County Superior Court, Case No. 34-  
13 2009-00037023. Comerica filed and ultimately prevailed on a summary judgment motion. As a  
14 result, judgment was entered against the Debtor in the amount of \$15,016,895.33. Mr. Westwood  
15 subsequently filed this chapter 11 case, to, among other things, preserve assets pending appeal of  
16 the judgment, and to propose a Plan of Reorganization that would also satisfy Comerica's  
17 judgment while also preserving those important rights. Mr. Westwood's appeal of the Comerica  
18 Judgment is currently pending before the Third District of the California Court of Appeal (the  
19 "Appeal").

20                 Currently, the Chapter 11 Trustee seeks approval of a compromise that would allow the  
21 Bank's Proof of Claim (the "Bank's Claim") in the amount of \$15,016,895.33 secured in part by  
22 the Debtor's home and an undeveloped lot in Loomis (the "Compromise Motion"). (Docket  
23 Entry No. 226). Pursuant to the proposed compromise, the Bank's Claim would then be  
24 supposedly subordinated to the extent necessary for a \$100,000.00 return to the holders of other  
25  
26

27                 <sup>1</sup> Mrs. Westwood is the non-filing spouse of Debtor Curtis Westwood. Should the appeal rights at issue be  
28 abandoned to her husband, the appeal successful, it will enhance her community property interest in assets of the  
estate.

1 allowed non-subordinated unsecured claims<sup>2</sup> and dismiss the Appeal (the “Compromise”).

2 In support of the Compromise Motion, the Trustee takes the position that the Appeal is  
3 meritless and of no value to the Estate. In fact, the Compromise Motion is supported by the  
4 Declaration of Gary Livaich (Docket Entry No. 229) who opines on the merits of the Appeal.<sup>3</sup>  
5 Mr. Livaich testifies that based on his review of the Appeal, “there are no triable issues of  
6 material fact and it is [his] opinion that the prospect of the Debtor’s success is remote.”  
7 Declaration of Gary Livaich in Support of Compromise Motion (“Livaich Decl.”) at ¶ 6. Mr.  
8 Livaich’s declaration indicates he reviewed the moving papers for the Motion for Summary  
9 Judgment, along with all supporting documentation, the Opposition, the Reply and met separately  
10 with the Debtor’s counsel and the Bank’s Counsel to discuss the strengths and weaknesses of  
11 each party’s respective positions. Livaich Decl. at ¶ 5.

12 The Trustee also submitted a declaration in support of the Compromise Motion in which  
13 he indicates his belief that the compromise with the Bank is in the best interests of the estate  
14 because, in his opinion: (1) the Bank is likely to prevail on the Appeal; (2) litigation of the Appeal  
15 and ensuing trial would be complex and expensive; and (3) “the holders of allowable claims, of  
16 which the Bank holds the largest, would benefit from the conservation of administrative resources  
17 and elimination of further delay in receiving a distribution.” Declaration of Jon Tesar in Support  
18 of Motion to Approve Comerica Compromise (“Tesar Decl.”) at ¶ 9.

19 If, as the Trustee and Mr. Livaich have testified, the Appeal is in actuality meritless, the  
20 Bank is likely to prevail, and the Appeal and ensuing trial would be complex and expensive, it  
21 should be abandoned to the Debtor.<sup>4</sup> For obvious reasons, Comerica would like the Trustee to  
22 dismiss the Appeal so that the Debtor may no longer pursue his sole remedy against the Bank –  
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25 <sup>2</sup> This provision is illusory given the fact there the claims in this case are owned by Comerica, or by Mr. Westwood’s  
26 sister, who also opposes this compromise. In other words, the consideration for this purported compromise and the  
27 benefit to the estate is subordinating Comerica’s claim to Comerica’s right to recover as an unsecured claimant.  
Concurrent with this Motion, the Westwoods are also opposing the motion to approve the Comerica Compromise.

<sup>3</sup> Mr. Livaich is counsel to the chapter 11 trustee.

<sup>4</sup> While the Westwoods disagree with this conclusion, the Trustee has staked his position out and should be held to it.

1 appealing the judgment against him.<sup>5</sup> However, the Bankruptcy Code specifically provides that  
2 the appropriate treatment of such asset – i.e., one that is meritless or without value, and one  
3 that is burdensome to the estate, should be abandoned to the Debtor. An alternate result would  
4 deprive the Debtor of his statutory rights to the Appeal and related litigation (if the judgment is  
5 overturned) only provide support for a settlement which is below the range of reasonableness and  
6 fails to provide the estate any benefit.

7 To be clear, the Westwoods do not believe the Appeal is meritless or of little value, and  
8 also opposes the Trustee's motion to dismiss the appeal and allow Comerica's claim in full, but  
9 the Trustee has staken out his position on the issue of the value of the Appeal and should be held  
10 to it.

### 11           III.    LEGAL ANALYSIS

12         11 U.S.C. § 554 specifically provides that “[o]n request of a party in interest and after  
13 notice and hearing, the court may order the trustee to abandon any property of the estate that is  
14 burdensome to the estate or that is of inconsequential value and benefit to the estate.” Here, the  
15 Debtor seeks an order from the Court ordering the Trustee to abandon the Appeal or in other  
16 words formally relinquish “the property at issue from the bankruptcy estate.” *Catalano v.*  
17 *Commissioner of Internal Revenue* 279 F.3d 682, 685 (9th Cir. 2002). If the Court orders  
18 abandonment, the Debtor’s interest in the Appeal will be restored “nunc pro tunc as of the filing  
19 of the bankruptcy petition.” *Id.* Generally, the party seeking abandonment has the burden to  
20 establish that the property is either burdensome or of inconsequential value. See *In re Alexander*  
21 289 B.R. 711, 715 (8th Cir. B.A.P. 2003).

22         The purpose of § 554 was to permit the trustee to abandon property to the debtor where  
23 administration thereof would not benefit the estate. See *Morgan v. K.C. Machine & Tool Co. (In*  
24 *re K.C. Machine & Tool Co.)* 816 F.2d 238, 246 (6th Cir. 1987)(“In enacting § 554, Congress

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25         <sup>5</sup> The Westwoods could also object to Comerica's claim, but because the Westwoods hold claims against Comerica,  
26 and wish to preserve their right to a jury trial, abandonment of the appeal and related litigation is the most efficient  
27 and direct method of navigating recent constitutional issues raised by the U.S. Supreme Court's *Stern v Marshall*  
28 (2011) 2011 WL 2472792 decision (limiting constitutional authority of bankruptcy court to determine counterclaims  
against third parties in certain circumstances). The Plan the Westwoods will file in the case will address this  
difficulty by providing that the appeal and related state court litigation rights will be preserved.

1 was aware of the claim that formerly some trustees took burdensome or valueless property into  
2 the estate and sold it in order to increase their commissions.”) “Congress then gave the courts the  
3 power to order the trustee to abandon property at the request of a party in interest if the property  
4 was burdensome or valueless and of no benefit to the estate. *Id.* (citing 11 U.S.C. § 554(b)(1986  
5 Supp.).

6 In the Trustee’s own admission, the appeal does not have any value to the Estate. In fact,  
7 not only does it not have value, but it would also be burdensome if the Estate were to retain and  
8 pursue the Appeal. Fortunately, the Bankruptcy Code has provided a mechanism for the Trustee  
9 to abandon property which is burdensome and has inconsequential value and benefit to the Estate.  
10 See 11 U.S.C. 554(b). The Westwoods believe the administration of this asset would benefit the  
11 estate by potentially reducing or eliminating Comerica's claim, and, while the Trustee disagrees,  
12 the proper result is abandonment to the Debtor, not abandonment to Comerica.

13 A. **The Trustee asserts that the Appeal is of Inconsequential Value and Benefit to the**  
14 **Estate**

15 Pursuant to the Compromise Motion and subject to the provisions of the proposed  
16 compromise with Comerica, the Trustee intends to dismiss the Appeal. In support of his Motion,  
17 the Trustee himself indicated that, in his opinion, the Bank is likely to prevail. Tesar Decl. at ¶ 9.  
18 Furthermore, Mr. Livaich opines that the Appeal is both meritless and that the Debtor's prospect  
19 for success is remote. Livaich Decl. at ¶¶ 6-12. If that is truly the case, then what, if anything is  
20 the benefit or value to the estate? An allegedly meritless claim or appeal can not be attributed any  
21 monetary value and thus should be abandoned under applicable law.

22 Presumably, Comerica will argue that preserving the Appeal and subsequently dismissing  
23 it provides benefit to the Estate by facilitating the Compromise. Unfortunately for Comerica,  
24 however, is that the Compromise benefits one party and one party only – itself. There are no  
25 unsecured creditors which benefit from Comerica subordinating its Claim to the extent necessary  
26 to assure a likely \$100,000 return to the holders of other allowed non-subordinated unsecured  
27 claims. As such, it can not meritoriously be argued that the dismissal of the Appeal and the  
28 resulting effectuation of the Compromise benefit the Estate.

1           **B. The Trustee Believes the Appeal is Burdensome to the Estate and Therefore Should**  
2           **be Abandoned**

3           Again, the Trustee has alleged that the Appeal is currently burdensome to the estate. In  
4           the Trustee's opinion, "litigation of the Appeal and ensuing trial would be complex and  
5           expensive" and "the holders of allowable claims, of which the Bank holds the largest, would  
6           benefit from the conservation of administrative resources and elimination of further delay in  
7           receiving a distribution." Tesar Decl. at ¶ 9. Under the Trustee's independent review of the  
8           Appeal, the attendant cost and complexity of the litigation make it burdensome to the Estate. As  
9           such, and to fulfill the purpose for abandonment, the Trustee should be compelled to abandon the  
10          Appeal. See *In re Paolella*, 79 B.R. 607, 609 (Bankr.E.D.Pa 1987) ("the principle of  
11          abandonment was developed by the courts to protect the bankruptcy estate from the various costs  
12          and burdens of having to administer property which could not conceivably benefit unsecured  
13          creditors of the estate.")

14          If the pursuit of the Appeal is so complex and expensive it should not be pursued, then  
15          dismissal (as is proposed in the Compromise Motion) is not the answer since that only benefits  
16          Comerica. There is absolutely no harm to the Estate by abandoning the Appeal to the Debtor,  
17          permitting him to further pursue it, allow him and his wife to fund it, and if successful, reap the  
18          potential benefits.

19           **IV. CONCLUSION**

20          Accordingly, the Debtor respectfully requests that the Court compel the Trustee to  
21          abandon the Appeal pursuant to 11 U.S.C. § 554.

22          DATED: December 28, 2011

23           DOWNEY BRAND LLP

24          By: \_\_\_\_\_

25             
26           JAMIE P. DREHER  
27           Attorney for Curtis and  
28           Deborah Westwood